

Tribe's bid for casino won't be smooth sailing

By Mark Arsenault | GLOBE STAFF JANUARY 31, 2012

It is one of the most contentious aspects of the state's new casino law: a provision that appears to give the Mashpee Wampanoag tribe a head start in developing a gambling resort in Southeastern Massachusetts without the threat of local competition.

But the path ahead for a tribal casino is much more difficult than previously disclosed. It depends on the outcome of an ongoing legal battle that began a country away, potentially requires an act of Congress, and could take years to resolve with no guarantee of success, according to a Globe analysis.

The problem lies in the land.

Tribal gaming can only occur on Indian land as defined by federal law. So when the Mashpees finally buy real estate for a casino, they must persuade the US Department of Interior to take the parcel into trust on behalf of the tribe.

But the Supreme Court, in 2009, stripped much of the power of the federal government to take land into trust, leaving the

tribe hoping for help from Congress, or clarification from the courts.

In the meantime, state casino regulators will have to decide if they will move on without the tribe and open the southeast region to bidding by a commercial developers, a potentially risky choice.

In crafting the casino law, lawmakers determined that the state could handle up to three gambling resorts. They held off competition in the southeast under the theory that a federally recognized Indian tribe - the Mashpees - would pursue a tribal casino there under the federal Indian Gaming Regulatory Act, known as IGRA.

If there is to be a tribal casino in the southeast, the state Gaming Commission is expected not to seek bids for a commercial resort in that region.

But if state regulators eventually give up on the Mashpees and allow a commercial casino in the southeast, they risk that the tribe may someday overcome the roadblocks and open an unwanted fourth resort casino in the state, undercutting the market.

“We cannot predict the future but what we do know is we

have specific rights as a federally recognized tribe that others don't," Cedric Cromwell, the tribe's chairman, said in an interview.

The deference to the tribe in state law is being challenged in federal court by KG Urban Enterprises, a developer seeking to build a commercial casino in New Bedford. A hearing is scheduled for today in US District Court in Boston.

The state law lists several benchmarks the Mashpees must meet to show progress. By July 31, the tribe must acquire land for the project and negotiate the operating terms of a tribal casino in a compact with Governor Deval Patrick, as required by federal laws that govern tribal gaming. The tribe must also win approval for the compact in the Legislature, and schedule a referendum to get the endorsement of the host community.

If the tribe fails to meet the deadline, the Gaming Commission is required to open the southeast region to competitive bids for a commercial casino license, no later than Oct. 31.

Cromwell said he is confident that the tribe will meet all the benchmarks.

But even if the tribe makes its state deadline, the Gaming Commission has the discretion, beginning Aug. 1, to determine whether the tribe will be able to get land taken into trust. The commission must open the region to competitive bids if it concludes that land issues will be too great for the tribe to overcome.

The federal process is not expected to be swift.

“Even with all the ducks in a row this still takes a long time,” said Kathryn Rand, co-director of the Institute for the Study of Tribal Gaming Law and Policy at the University of North Dakota. Review periods lasting two to 10 years for land in trust applications are “not at all atypical,” she said.

The Supreme Court case that complicates the process stems from a dispute in Rhode Island over a land-in-trust application by the Narragansett Tribe, which was opposed by the former governor, Donald Carcieri.

The court ruled in that case that the Department of Interior could only take land into trust for tribes that were under federal jurisdiction in 1934, the date of the Indian Reorganization Act, said professor Robert Clinton, a tribal law expert at the Sandra Day O’Connor College of Law at Arizona State University.

“The problem with that decision is there wasn’t any such list in 1934,” said Clinton, who believes the Supreme Court was wrong in its ruling. “They created a category that didn’t historically exist.”

Tribes have asked Congress to amend the law. The Mashpee Wampanoag, which won federal recognition in 2007, spent more than \$200,000 on Washington lobbying in the two years since the decision, and more than \$1.2 million on federal lobbying since 2000, according to the Center for Responsive Politics.

But the gridlocked Congress has not acted - and most specialists doubt any fix will be passed soon.

In the meantime, the Department of Interior has decided to test the boundaries of the Supreme Court decision, by approving an application to take 152 acres into trust for the Cowlitz tribe of Washington State, which plans to build a gambling resort in partnership with the operators of the Mohegan Sun casino in Connecticut. The Cowlitz won federal recognition in 2000.

The 2010 land-in-trust decision for the Cowlitz was immediately challenged in federal court by local county and municipal officials, in what could be an important test case.

The suit has not yet reached trial and a decision could be long off, according to a spokeswoman for the government of Clark County, Washington, the lead plaintiff.

The Department of Interior could conceivably take land into trust for other tribes while the test case is pending, though each instance probably would end up in court, said Rand. “That’s just the reality of Indian gaming politics,” she said. “Proposals will be challenged politically, legally and in the court of public opinion.”

Cromwell said it is “inevitable” that the tribe will have land taken into trust in Massachusetts. “It’s unheard of that a sovereign nation does not have any land to provide self-governance and self-determination for its nation,” he said.

The tribe has quietly investigated sites throughout Southeastern Massachusetts, including parcels in Taunton and Bridgewater. Cromwell declined to say where the tribe will end up because it has not yet reached a deal to buy land.

He blasted “obstructionists” who file lawsuits delaying land-in-trust actions for tribes. “We’re not the ones stopping job creation,” Cromwell said. “It’s these greed-based interests with these frivolous lawsuits, which ultimately will lose.”

Stephen Crosby, the designated chairman of the state Gaming Commission, is not yet officially on the job and did not want to comment on the decisions facing the commission in the Southeast region.

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